Filed 3/3/09 Kutter v. Valverde CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CARL KUTTER, Plaintiff and Appellant, v. GEORGE VALVERDE, as Director, etc., Defendant and Respondent.	G040464 (Super. Ct. No. 30-2008-00101270) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Law Offices of Chad R. Maddox and Chad R. Maddox for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Alicia M.B. Fowler, Assistant Attorney General, Celine Cooper and Dana T. Cartozian, Deputy Attorneys General, for Defendant and Respondent.

* * *

INTRODUCTION

Carl Kutter's driving privileges were suspended by the Department of Motor Vehicles (DMV) for one year due to his violation of Vehicle Code section 23136, which prohibits individuals under 21 years of age from driving with any presence of alcohol in their system. (All further statutory references are to the Vehicle Code.) Kutter filed a petition for a peremptory writ of mandamus, asking the trial court to reverse the DMV's administrative decision. The trial court denied the petition, and we affirm.

Kutter's only argument is that the DMV failed to prove he had a blood alcohol concentration (BAC) of .01 percent or higher, because the preliminary alcohol screening tests and chemical tests used to establish his BAC were conducted more than three hours after the time Kutter had been driving. Section 23152, subdivision (b), on which Kutter relies, creates a rebuttable presumption "that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving." As explained *post*, section 23152, subdivision (b) is inapplicable in an administrative review of the DMV's suspension of driving privileges based on a driver's violation of section 23136.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On August 25, 2007, at approximately 3:50 a.m., California Highway Patrol Officer J. White was dispatched to the scene of a traffic accident. Officer White arrived at Marquette Way near Plano Trabuco Road, in the private community of Coto de Caza, at 4:14 a.m. Officer White encountered Kutter at approximately 4:35 a.m., as Kutter walked back to the scene of the accident. Kutter advised Officer White he had walked to a friend's house to call a tow truck. Kutter admitted he had been driving the vehicle when he lost control, struck a concrete curb, and then struck a tree. Kutter stated the accident had occurred at 1:15 a.m.

When Officer White encountered Kutter, he smelled a strong odor of alcohol on Kutter's breath. He also observed Kutter's eyes were red and watery, and his gait was unsteady. Kutter denied consuming any alcohol before or after the accident. Kutter performed poorly on the field sobriety tests administered by Officer White. Preliminary alcohol screening tests performed at 5:00 a.m. and 5:02 a.m. were positive; Officer White placed Kutter under arrest for suspicion of driving while under the influence of alcohol.

Kutter was advised of his obligation to undergo chemical testing to determine his BAC, and he selected the breath test. Two breath tests performed at 5:12 a.m. and 5:14 a.m. registered Kutter's BAC at .07 percent. Kutter's driving privileges were suspended as a consequence of his driving a vehicle while under the age of 21 with a BAC of .01 percent or higher. (§§ 23136, subd. (a), 13353.3, subd. (b)(3).)

At Kutter's request, an administrative hearing was held. The administrative hearing officer sustained the suspension order, and suspended Kutter's driving privileges for one year. A departmental review was conducted, and the suspension order was upheld.

Kutter filed a petition for a peremptory writ of mandamus on January 11, 2008. The trial court issued a tentative decision to deny the petition. After a hearing, the tentative decision became the court's ruling. Judgment was entered June 11, 2008.[1]

DISCUSSION

"In ruling on an application for a writ of mandate following an order of suspension or revocation, a trial court is required to determine, based on its independent

[1] On our own motion, we augment the record on appeal with the judgment, filed in the trial court on June 11, 2008 in *Kutter v. Valverde* (Super. Ct. Orange County, No. 30-2008-00101270). (Cal. Rules of Court, rule 8.155(a)(1)(A).)

Kutter's notice of appeal, filed May 29, 2008, was premature. We will treat the notice of appeal as having been filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(e)(2).)

judgment, '"whether the weight of the evidence supported the administrative decision."' [Citation.] Here, as noted above, the trial court denied the writ. On appeal, we 'need only review the record to determine whether the trial court's findings are supported by substantial evidence.' [Citation.] '"We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings. [Citation.]"' [Citation.]" (*Lake v. Reed* (1997) 16 Cal.4th 448, 456-457.) Because the trial court issued a statement of decision, and no party filed any objections to it, we infer the court made all necessary implied factual findings to support its judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

The trial court's statement of decision reads in relevant part as follows: "The principal controverted issue at trial was whether Finding No. 3 . . . made by respondent in its decision of October 24, 2007, was supported by the weight of the evidence. The court has determined the following: [¶] Respondent's Finding No. 3 that Petitioner was driving a motor vehicle, when he was under the age of 21, and he had a blood alcohol concentration of .001%[2] or more as measured by a preliminary alcohol screening or other chemical test is supported by the following evidence: [¶] There is no dispute Petitioner had operated the vehicle identified in the police report. Petitioner was intoxicated when he spoke to the officer. He recalled he had a passenger, but not who it was, and he had not hit his head during the accident. He denied he had drunk any alcohol either before or after the accident. Preliminary alcohol screening and chemical tests taken between 3 and 4 hours after the accident established blood alcohol concentrations

[2] This appears to be a typographical error. The administrative findings refer to a BAC of .01 percent, not .001 percent. Kutter does not claim any error based on this portion of the statement of decision.

between .064% and .07%. The roadway where the accident occurred was straight and dry. Petitioner admitted he was going about 35 miles per hour; he had just completed a right turn and lost control of his vehicle, striking the tree. There was no claim of mechanical malfunction. Petitioner offered no evidence that his blood alcohol concentration was not at least .01 while he was operating his vehicle. [¶] The Petition for peremptory writ of administrative mandamus is DENIED."

Kutter was charged with violating section 23136, subdivision (a), which reads in relevant part, "it is unlawful for a person under the age of 21 years who has a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test, to drive a vehicle."

Section 13557, subdivision (b)(2) sets out the facts to be proven by the DMV in an administrative review of a challenged suspension of driving privileges based on a violation of section 23136. "If the department determines in the review of a determination made under Section 13353.2, by the preponderance of the evidence, all of the following facts, the department shall sustain the order of suspension or revocation, or if the person is under 21 years of age and does not yet have a driver's license, the department shall delay issuance of that license for one year: [¶] (A) That the peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of Section 23136, 23140, 23152, or 23153. [¶] (B) That the person was placed under arrest or, if the alleged violation was of Section 23136, that the person was lawfully detained. [¶] (C) That the person was driving a motor vehicle under any of the following circumstances: [¶] . . . [¶] (iii) When the person was under 21 years of age and had a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test, or other chemical test." (§ 13357, subd. (b)(2).)

Kutter argues the DMV failed to meet its burden to prove he had a BAC of .01 percent, relying on section 23152, subdivision (b), which reads as follows: "It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her

blood to drive a vehicle. [¶] For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. [¶] In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving." Because Kutter's breath tests were performed more than three hours after the accident occurred, he argues the presumption under section 23152, subdivision (b) cannot apply, and there was no other proof of his BAC at the time of the accident.

Section 23152, subdivision (b), however, applies by its terms only in a prosecution for violation of that subdivision. A violation of section 23136, however, does not result in criminal prosecution; it "is neither an infraction nor a public offense . . . . A zero tolerance law violation is subject only to civil penalties, to be administered by the DMV through specified civil administrative procedures." (*Coniglio v. Department of Motor Vehicles* (1995) 39 Cal.App.4th 666, 673.) An action under section 23136 is therefore not a "prosecution," and section 23152 does not apply in this case.

There is no statutory limit on the time that may expire between the time when a person under 21 years of age acknowledges driving, and when a preliminary alcohol screening test or chemical test measures his or her BAC. This analysis is consistent with the legislative intent in enacting section 23136 – to prevent persons under 21 years of age from driving with *any* amount of alcohol in their system. (*Coniglio v. Department of Motor Vehicles, supra,* 39 Cal.App.4th at pp. 674-675 & fn. 6.) Persons under 21 years of age have due process protection to their property interest in their drivers' licenses; a driver found to be in violation of section 23136 may challenge the reliability of the preliminary alcohol screening test or chemical test used to establish his or her BAC. (*Coniglio v. Department of Motor Vehicles, supra,* 39 Cal.App.4th at

p. 671.) There may be other factual circumstances under which the time elapsing between the acknowledged time of driving and the time the test is performed is so lengthy that the test results can no longer be indicative of the BAC at the time of driving. Those arguments, however, were not made and do not arise in this case. We conclude that, here, based on the evidence discussed, substantial evidence supported the trial court's findings.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.